

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RANDOLPH A. DODSON)
Claimant)
VS.)
PEOPLELEASE¹)
Respondent)
AND)
ARCH INSURANCE COMPANY)
Insurance Carrier)

Docket No. 1,042,494

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the January 15, 2009, Order Referring Claimant for Independent Medical Evaluation entered by Administrative Law Judge Brad E. Avery. James E. Martin, of Overland Park, Kansas, appeared for claimant. M. Joan Klosterman, of Kansas City, Missouri, appeared for respondent.

The Administrative Law Judge (ALJ) ordered claimant to submit to an independent medical examination (IME) to be performed by Dr. Mark Bernhardt. Dr. Bernhardt was asked to render an opinion as to whether a work related accident of September 24, 2008, caused, accelerated or aggravated claimant's back symptoms. Dr. Bernhardt was further asked to render an opinion regarding what, if any, additional medical care is necessary to cure and relieve the effects of claimant's work related accident.

¹ The Application for Hearing and the ALJ's Order Referring Claimant for Independent Medical Evaluation list the employer/respondent as MOKAN Distribution Services, Inc. However, on January 26, 2009, the ALJ, upon motion of respondent and after consultation with the parties, entered an Order that the employer/respondent in the above case be designated as PeopLease and that MO-Kan Distribution Service, Inc., be removed as the employer/respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 13, 2009, Preliminary Hearing and the exhibits; the transcript of the deposition of Randolph Dodson taken November 7, 2008, and the exhibits; together with the pleadings contained in the administrative file.

ISSUES

Respondent contends the ALJ erred in ordering an IME where there was only one competent opinion regarding causation of claimant's complaints.

Claimant argues that the Workers Compensation Act gives the ALJ the authority to appoint a physician to perform an IME.

The issue for the Board's review is: Did the ALJ exceed his jurisdiction and/or commit error by referring claimant for an IME?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant is alleging that he injured his low back while working for respondent on September 24, 2008. Respondent denies that claimant's injury is work related. Instead, respondent contends, inter alia, that claimant's current condition is the natural consequence of his preexisting condition. Claimant's medical expert, Dr. Edward Prostic, issued a report wherein he opines that claimant suffered additional injury on September 24, 2008. Respondent's expert, Dr. David Clymer, compared MRI films of claimant's lumbar spine taken before and after September 24, 2008, and said they were essentially the same. As such, Dr. Clymer does not believe that claimant sustained a new injury.

K.S.A. 44-516 states:

In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct. The report of any such health care provider shall be considered by the administrative law judge in making the final determination.

An order for an IME under K.S.A. 44-516 is not a finding of compensability. The ordered examination is not medical treatment. Thus, it is neither a preliminary award of benefits entered under the preliminary hearing statute, nor is it a final award. The Board has previously held that an order for an IME is an interlocutory order.² K.S.A. 2008 Supp. 44-551(i)(1) limits the Board's jurisdiction to review of "final orders, awards, modifications of

² See, e.g., *Scott v. Total Interiors*, No. 244,761, 2000 WL 1134444 (Kan. WCAB July 28, 2000); *Kitchen v. Luce Press Clippings, Inc.*, No. 228,213, 1999 WL 288895 (Kan. WCAB Apr. 2, 1999).

awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge" The ALJ's Order Referring Claimant for Independent Medical Evaluation is interlocutory in nature.

Generally, a decision or order is final only when it resolves all issues between the parties and reserves no further question for future action. However, the Board has recognized an exception to this general rule.³ In *Skahan*,⁴ the Court of Appeals set out three criteria whereby an order may be final even if it does not resolve all issues between the parties. The order may be final if it (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment. In our view, however, an order referring a claimant for an IME does not satisfy these three criteria. The order for an IME will not conclusively determine the disputed question of whether claimant suffered personal injury by accident that arose out of and in the course of his employment with respondent. That will be an issue at the time of the submission of the case for a final determination by the ALJ in the award and can then be reviewed by the Board on an appeal from that award, if necessary.

The purpose of the ordered examination goes to the merits of the action in that it will address the issue concerning the causation of claimant's injury. That report may also be utilized by the ALJ in determining other issues, but the questions concerning the propriety of the examination and the admissibility of the results of that examination are not reviewable until after the time the final award is issued by the ALJ. The Order Referring Claimant for Independent Medical Evaluation, therefore, is interlocutory and not final, and the Board is without jurisdiction to review the ALJ's Preliminary Decision at this time.⁵

ORDER

WHEREFORE, it is the finding, decision and order of the Board that this appeal of the Order Referring Claimant for Independent Medical Evaluation dated January 15, 2009, entered by Administrative Law Judge Brad E. Avery is dismissed.

IT IS SO ORDERED.

³ *Rhodeman v. Moore Management*, No. 234,890, 1999 WL 1008029 (Kan. WCAB Oct. 12, 1999).

⁴ *Skahan v. Powell*, 8 Kan. App. 2d 204, 206, 653 P.2d 1192 (1982); *Scales v. Shawnee Gardens Nursing Center*, No. 1,021,953 and *Scales v. Presbyterian Manors, Inc.*, No. 1,021,954, 2005 WL 3030764 (Kan. WCAB Oct. 11, 2005).

⁵ See *Kirschbaum v. U.S.D. 375*, No. 1,043,255 (WCAB Order filed March 18, 2009); *Crease v. Vezers Precision Industrial Constructors International, Inc.*, No. 1,035,775, 2007 WL 4662039 (Kan. WCAB Dec. 7, 2007).

Dated this _____ day of April, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James E. Martin, Attorney for Claimant
M. Joan Klosterman, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge